IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WALTER JAMES PAIN,
Appellant.

No. 2 CA-CR 2018-0093
Filed December 10, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20165644001
The Honorable Janet C. Bostwick, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Walter Pain was convicted of aggravated assault of a peace officer. On appeal, he argues the trial court erred by not precluding a statement he made to a police officer following the assault. He also contends the court erred by providing an example of circumstantial evidence during the final jury instructions. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the jury's verdict. *See State v. Lewis*, 236 Ariz. 336, ¶ 2 (App. 2014). Late one afternoon in December 2016, Tucson Police Department Sergeant Alexander was conducting a welfare check on Pain, who was sleeping on the ground in front of a bus stop. Alexander told Pain he "need[ed] to get up off the ground," but Pain refused to move, instead responding to Alexander with obscenities. When Alexander attempted to arrest Pain, Pain tried to grab Alexander's gun and the two men fought. Pain kicked Alexander in his shin and stomach, and Alexander was eventually able to subdue Pain using his baton. A bystander recorded part of the incident on his cell phone.

¶3 A grand jury indicted Pain with aggravated assault of a peace officer causing physical injury and aggravated assault of a peace officer by attempting to take control of the officer's firearm. The jury found Pain guilty of the aggravated assault causing physical injury but not guilty of the aggravated assault by attempting to take Alexander's gun. The trial court sentenced him to a 4.5-year term of imprisonment. We have jurisdiction over Pain's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Prior Statement

¶4 Pain first argues the trial court erred by admitting his statement to a police officer that the judge would be lenient because he was

drunk. He contends it was irrelevant and unfairly prejudicial. We review a court's evidentiary rulings for an abuse of discretion, *State v. Ellison*, 213 Ariz. 116, ¶ 42 (2006), viewing "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect,'" *State v. Harrison*, 195 Ariz. 28, ¶ 21 (App. 1998) (quoting *State v. Castro*, 163 Ariz. 465, 473 (App. 1989)).

¶5 Evidence is relevant, and thus admissible, if "it has any tendency to make a fact more or less probable than it would be without the evidence," and that fact "is of consequence in determining the action." Ariz. R. Evid. 401, 402. This standard is "not particularly high." *State v. Oliver*, 158 Ariz. 22, 28 (1988). Evidence demonstrating a defendant's consciousness of guilt is generally relevant and admissible. *See State v. Garza*, 216 Ariz. 56, ¶ 39 (2007); *see also State v. Ferguson*, 149 Ariz. 200, 210 (1986) (jurors could infer guilt from defendant's statement that "he was going to plead insanity because 'It's the only way out. I have got to try it.'"); *State v. Fillmore*, 187 Ariz. 174, 179 (App. 1996) ("Evidence is relevant that tends to show a defendant's consciousness of guilt.").

¶6 At trial, a police officer testified that while Pain was receiving medical care after the altercation, he told the officer that "the Judge would show him leniency, because [Pain] would tell him he was drunk and didn't know what he was doing." Pain had earlier moved to preclude this testimony, contending any probative value was outweighed by the prejudicial impact because the comment was "inflammatory" and "sound[ed] basically like he[was] taunting the officers." The state responded that the statement was "very probative because it shows . . . that [Pain was] very cognizant of the fact that he . . . committ[ed] a crime." The court allowed the testimony, concluding the statement was relevant to Pain's "state of mind" and was not unfairly prejudicial.

¶7 The trial court did not abuse its discretion. *See Ellison*, 213 Ariz. 116, ¶ 42; *Harrison*, 195 Ariz. 28, ¶ 21. We agree with the state that Pain's statement demonstrates "that he was trying to evade responsibility, which in turn showed that he knew that he had done something wrong (*i.e.*, assaulted the police officer)." It was thus relevant and admissible as evidence of Pain's consciousness of guilt.[1] *See* Ariz. R. Evid. 401, 402; *see also Fillmore*, 187 Ariz. at 179.

[1]In his opening brief, Pain maintains his remark "was simply a response to the officer's statement that if [Pain] had shot Alexander[, Pain] would be in more trouble." He thus reasons that the statement is irrelevant

¶8 Pain maintains, however, that the prejudicial impact outweighed any probative value. Specifically, he contends the evidence "would lead the jurors to want to convict him because he was attempting to escape responsibility." Relevant evidence may be excluded if the "probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. "The trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice" and "has broad discretion in deciding the admissibility" of the evidence. *Harrison,* 195 Ariz. 28, ¶ 21.

¶9 Pain's statement, as explained above, was relevant because it demonstrated consciousness of guilt. Notably, Pain was also permitted to argue to the jury the statements were meaningless and only meant to taunt the police officer to whom he was speaking. Under these circumstances, the evidence of his statement did not have "an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545 (1997). On the contrary, it was prejudicial "in the sense that all good relevant evidence is": It tended to show that Pain knowingly assaulted Alexander. *State v. Schurz*, 176 Ariz. 46, 52 (1993). We therefore cannot say the trial court abused its broad discretion in concluding that the probative value of the evidence was not outweighed by a danger of unfair prejudice. *See* Ariz. R. Evid. 403; *see also Harrison*, 195 Ariz. 28, ¶ 21.

Jury Instructions

¶10 Pain next argues the "trial court erred by giving an example of circumstantial evidence during final [jury] instructions." Because he did not object below, he has forfeited review for all but fundamental, prejudicial

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because it referred to a "hypothetical" situation and that he was not admitting he had assaulted Alexander. But the testimony was in response to the prosecutor's question, "At some point, did he ever make another reference to having been drinking alcohol that day?" And the officer's statement to Pain was not admitted at trial. The record therefore does not support his argument. And even if Pain's account was correct, we fail to see how that would affect the relevancy of the statement under these circumstances. In either case, the statement demonstrates that Pain sought to evade the consequences of his actions—real or hypothetical—by relying on his intoxication. *See Ferguson*, 149 Ariz. at 210.

error. *See* Ariz. R. Crim. P. 21.3(b); *see also State v. Moody*, 208 Ariz. 424, ¶ 189 (2004).[2]

¶11 During final jury instructions, the trial court stated:

> Evidence may be direct or circumstantial. . . .
>
> Circumstantial evidence is the proof of a fact or facts from which the existence of another fact may be determined. Let me give you an example: I walk outside the courthouse after a long day inside. It's cloudy and gray. The ground is wet. It smells like pre-soken dust. I see puddles. I might conclude, from that circumstantial evidence, that it rained. I didn't actually perceive the rain happening. That might be one example you can consider if you're trying to understand circumstantial evidence, the proof of a fact or facts from which the existence of another fact may be determined, which is entirely in your discretion to decide.

¶12 On appeal, Pain argues that the trial court's instruction was erroneous because "it did not indicate that circumstantial evidence could lead to more than one inference and that the jury could select among the inferences." However, the court's example did not state or imply that only one inference could be drawn, instead using the conditional phrase, "I

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[2]Pain argues he did not forfeit this objection because the trial court added the language while orally giving the jury its final instructions. Relying on *State v. Vermuele*, 226 Ariz. 399, ¶ 6 (App. 2011), which involves the preservation of objections that first arise during the pronouncement of sentence, he contends he had no opportunity to object because he "was faced with interrupting the judge during instructions." Unlike the type of issue addressed in *Vermuele*, in which a defendant has no "express procedural opportunity" to object before sentencing has concluded and the trial court loses jurisdiction to modify that sentence, *id.* ¶¶ 7-8, Pain could have objected after the court read the final instructions, or before, during, or after closing arguments. Indeed, the rules expressly require him to do so. *See* Ariz. R. Crim. P. 21.3(b). He thus forfeited any objection to this issue for all but fundamental, prejudicial error.

might conclude." It simply provided the jury with a real-life example to help explain what constitutes circumstantial, as opposed to direct, evidence. *See State v. Riley*, 12 Ariz. App. 336, 337 (1970) ("Circumstantial evidence is the proof of the existence of some fact from which fact the existence of the thing in issue may be legally and logically inferred.").

¶13 Additionally, the trial court immediately followed the example by instructing the jury it was to "determine the weight to be given to all the evidence, without regard to whether it's direct or circumstantial." Although Pain argues the example lowered the state's burden of proof, the jury was also instructed that it was the state's burden to prove all the elements of the charged offenses beyond a reasonable doubt. Our supreme court has stated, "A circumstantial evidence instruction is not fundamental error when given with a legally sound reasonable doubt instruction." *State v. Orendain*, 188 Ariz. 54, 56 (1997). Pain has not cited any legal authority—and we have found none—for his assertion that the jury needed to be instructed that it "should evaluate rival inferences to determine whether one is more logical and better supported by experience." *Cf. State v. Nash*, 143 Ariz. 392, 404 (1985) (state need not "negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence"). Viewed as a whole, the instructions clearly conveyed to the jury that any inferences it drew had to be based on the evidence presented and, together, the evidence and inferences must support a finding of guilt beyond a reasonable doubt. The court thus did not err.

¶14 Moreover, Pain cannot show he was prejudiced by the trial court's example of circumstantial evidence. *See State v. Henderson*, 210 Ariz. 561, ¶ 20 (2005) (in fundamental-error review, defendant bears burden of establishing alleged error caused him prejudice). During closing arguments, he was able to argue that the evidence supported different inferences. *See State v. Fierro*, 220 Ariz. 337, ¶ 14 (App. 2008) (ambiguities in instructions can be cured during closing arguments). The fact that the jury acquitted Pain of aggravated assault by attempting to take Alexander's gun demonstrates that they were not confused by the instruction or that the state's burden of proof had effectively been lowered. Additionally, both the video of the incident and other witness testimony provided overwhelming evidence that Pain committed aggravated assault of a police officer causing physical injury. *See State v. Gallegos*, 178 Ariz. 1, 11 (1994) (no prejudice when "[o]verwhelming evidence in the record supports the jury's verdict"); *see also State v. Fimbres*, 222 Ariz. 293, ¶ 43 (App. 2009). Accordingly, Pain has failed to meet his burden of showing that error occurred or that he was in any way prejudiced. *See Henderson*, 210 Ariz. 561, ¶ 20.

Disposition

¶15 For the foregoing reasons, we affirm Pain's conviction and sentence.